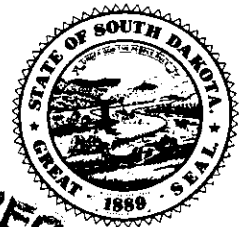


South Dakota Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070



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August 27, 1999

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Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: Western Wireless Corporation Petition for
Preemption of an Order of the South Dakota
Public Utilities Commission
CC Docket No. 96-45

Dear Ms. Salas:

Enclosed for filing you will find original and four copies of Comments of South Dakota
Public Utilities Commission to Petition for Preemption by Western Wireless.

Very truly yours,

Camron Hoseck
Special Assistant Attorney General

CH:dk
Enc.



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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
WESTERN WIRELESS)
CORPORATION)
)
Petition for Preemption of)
an Order of the South Dakota)
Public Utilities Commission)

CC Docket No. 96-45

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COMMENTS OF SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
TO PETITION FOR PREEMPTION BY WESTERN WIRELESS

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COMMENTS OF SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
TO PETITION FOR PREEMPTION BY WESTERN WIRELESS

PRELIMINARY STATEMENT

Plain and simple, Western Wireless, in the corporate form of GCC License Corporation, did not meet the necessary requirements to become an eligible telecommunications carrier (ETC) when it came before the South Dakota Public Utilities Commission (SDPUC). It did not prove up its case. Subsequently, it was not afforded ETC status. Because of this, it now seeks preemption by the Federal Communications Commission (FCC) for this determination. Simultaneously, it has appealed the SDPUC decision to South Dakota State Circuit Court. (Appendix A). Underlying this petition for preemption is Western Wireless' desire that "[t]he FCC should send the SDPUC and other state commissions a clear message. . ." that ETC status must be granted on the basis of capability and commitment. (Western Wireless petition at p. 9). SDPUC resists the petition for preemption.

FACTS

An evidentiary hearing was held before the SDPUC on December 17, 1998, at which time Western Wireless was afforded an opportunity to prove its entitlement to ETC status. The ultimate findings of fact found by the SDPUC are as follows. References are to the actual hearing transcript and exhibits admitted at the hearing.

FINDINGS OF FACT

1. On August 25, 1998, GCC filed an application requesting designation as an ETC for all of the counties within South Dakota. Exhibit 1. GCC's application listed counties it was requesting for ETC status instead of exchanges because it did not know all the exchanges in the state. Tr. at 40. GCC currently provides mobile cellular service in South Dakota. Tr. at 19. GCC uses the trade name of Cellular One. Tr. at 76. GCC is a wholly-owned subsidiary of Western Wireless Corporation (Western Wireless). Tr. at 22.
2. Pursuant to 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of section 214(e)(1) as an ETC for a service area designated by the Commission. The Commission may designate more than one ETC if the additional requesting carrier meets the requirements of section 214(e)(1). However, before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. 47 U.S.C. § 214(e)(2). GCC is requesting designation as an additional ETC throughout the state. Exhibit 3 at 10. South Dakota exchanges are served by both nonrural and rural telephone companies.
3. Pursuant to 47 U.S.C. § 214(e)(1), a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution.
4. The Federal Communications Commission (FCC) has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equal; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a).
5. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.411.
6. GCC asserts that it currently provides all of the services as designated by the FCC through its existing mobile cellular services. Tr. at 123. Cellular service is generally provisioned as a mobile service. Tr. at 25.
7. Although GCC stated that its existing mobile cellular services currently provide all of the services supported by universal service, GCC intends to offer universal service initially through a fixed wireless offering. Exhibit 4 at 7. GCC specifically stated that it is not seeking universal service funding for the mobile cellular service that it currently provides. Exhibit 3 at 8.

8. GCC states that the Commission can look at the current mobile services it provides to determine whether it meets ETC requirements because GCC would use the same network infrastructure to provision its fixed wireless service. Tr. at 29. The Commission disagrees, and finds that it cannot base its decision on whether to grant ETC status to GCC based on GCC's current mobile cellular service because it is not sufficiently comparable to its proposed fixed wireless system. GCC's own statements support this finding.

9. For example, GCC stated that "[b]ecause GCC's cellular network is designed to serve mobile customers, it would be inappropriate to compare the voice quality using a handheld mobile phone with the voice quality of a fixed wireline service. This is so because GCC's cellular network has been designed to serve mobile customers that may be close to, and in direct line-of-sight of, a transmitter or several miles from, and not in line-of-sight of, a transmitter. To optimize voice quality for its universal service customers, GCC will construct additional antenna towers, as necessary, and will install fixed wireless network equipment (antennas and transmitters) at customer locations, as it did in Nevada where the Company provides universal service to residential and business customers." Exhibit 4 at 12.

10. Further, GCC conceded that there were currently gaps in coverage but stated that the current mobile service is difficult to compare to a fixed wireless service which will have telephones with greater power plus antennas. Tr. at 99.

11. Thus, the Commission finds that since GCC's universal service offering will be initially based on a fixed wireless system the Commission must look at whether the proposed fixed wireless system meets ETC requirements, not whether the existing mobile cellular service provides all of the services supported by universal service.

12. Even if the Commission could base its decision to grant ETC status on GCC's current provisioning of mobile cellular service, the Commission would be compelled to deny GCC ETC status. First, GCC does not offer a certain amount of free local usage. See 47 C.F.R. § 54.101(a)(2). Under current cellular service the subscriber pays for both incoming and outgoing calls. Tr. at 38. Second, as stated earlier, GCC's mobile cellular service has gaps in coverage that it hoped to fix through the use of a fixed wireless system. Tr. at 99. Therefore, the Commission finds that GCC has failed to show that its current mobile cellular system is able to offer all the services that are supported by federal universal support mechanisms throughout the state.

13. GCC also stated in its prefiled testimony and at the hearing that it intended to deploy personal communications service (PCS) and local multi-point distribution service (LMDS) in South Dakota. Exhibit 4 at 3. GCC initially stated that it holds PCS licenses to serve the entire state of South Dakota. *Id.* Later it was learned that Western PCS BTA1 License Corporation (Western PCS) owns the radio licenses for PCS in South Dakota. Tr. at 22. Western PCS is an indirect majority-owned subsidiary of Western Wireless. *Id.* Western PCS has not deployed any PCS systems in South Dakota. Tr. at 27.

14. GCC initially stated that it holds LMDS licenses to serve the entire state of South Dakota. Exhibit 4 at 3. Later it was learned that Eclipse Communications Corporation

(Eclipse) owns the radio licenses in South Dakota for LMDS. Tr. at 22. Eclipse is a wholly-owned subsidiary of Western Wireless. Id. In addition, at the hearing, a question was raised as to whether Eclipse had, in fact, received licenses for all of the BTAs in South Dakota. Tr. at 25. Eclipse is in the initial stages of designing and implementing LMDS. Tr. at 27.

15. The Commission finds it is unclear whether GCC intended to offer universal service through PCS or LMDS. However, the Commission finds that if universal service is eventually offered through PCS or LMDS, then Western PCS BTA1 or Eclipse may be the proper companies to apply for ETC status.

16. The Commission finds that it is clear from the record that GCC will initially rely upon a fixed wireless system to offer universal service. Therefore, the Commission shall look at whether the proposed fixed wireless system meets the ETC requirements.

17. GCC does not currently provide fixed wireless loops to any customer in South Dakota. Tr. at 28. GCC has not deployed fixed wireless because there has been no customer demand for the service. Tr. at 101. GCC believed that with a universal service offering, then a customer may want a fixed unit. Id.

18. The Commission finds that since GCC is not actually offering or providing a universal service offering through a fixed wireless system, it must deny GCC's application for ETC status throughout the state. Pursuant to 47 U.S.C. § 214(e)(2), the Commission may designate an additional requesting carrier as an ETC if it "meets the requirements of paragraph (1)." Paragraph one requires an ETC to offer the supported services throughout the area and advertise the availability of such services. GCC is not offering fixed wireless service nor is it advertising the availability of a fixed wireless service throughout South Dakota. Although GCC argues that there is no requirement that a requesting carrier actually offer the services at the time of its application, the plain language of the statute reads otherwise.

19. Moreover, GCC's application clearly demonstrates the reasons why a requesting carrier must actually be offering the supported services before applying for ETC status. The record shows that since GCC is not currently providing services through fixed wireless, it is impossible to determine whether GCC will meet ETC requirements when it actually begins to provide a universal service offering through a fixed wireless system.

20. First, it is unclear whether all customers in the state would be able to use a fixed wireless system if the Commission had granted ETC status to GCC. GCC has applied for ETC status in 13 states and asserted that it would be able to implement universal service immediately if it were designated an ETC. Tr. at 65. However, GCC's current network infrastructure does not serve the entire state. Tr. at 31, 80-81; Exhibit 9. GCC admitted that it could not provide service to every location in South Dakota. Tr. at 99. GCC would have to make changes and improvements to its network infrastructure in order to improve its voice quality for fixed wireless customers. Exhibit 4 at 12. It would need to construct additional cell sites as well as install high gain antennas and network equipment at

customer locations. Exhibit 4 at 7-8; Tr. at 109-110. The antennas would either be a small antenna attached to a fixed unit or a permanent antenna on the roof. Tr. at 92.

21. As an example of a fixed wireless offering, GCC noted the provisioning of fixed wireless service in Reese River Valley and Antelope Valley in Nevada and in North Dakota. Exhibit 4 at 8; Tr. at 100. In both of those cases, GCC had to put in extra cell sites to improve its fixed wireless service. Tr. at 99-100. In Nevada, GCC had to construct another cell site in order to give customers improved service because the original fixed wireless system had problems with blocking. Id.

22. Even if the Commission could grant a company ETC status based on intentions to serve, the Commission finds that GCC has failed to show that its proposed fixed wireless system could be offered to customers throughout South Dakota immediately upon being granted ETC status.

23. Second, GCC has not yet finalized what universal service offering it plans to offer to consumers. Exhibit 4 at 13. This lack of a definite plan creates questions as to its ability to offer universal service based on fixed wireless technology throughout the entire state. For example, GCC first stated that it had not set a rate for its universal service offering because GCC would first need to know what forms of subsidies it would receive. Tr. at 33-34, 89, 114. GCC's position was that it was difficult to know whether GCC would price service at \$15.00 a month when it does not know whether it will have access to the same subsidies that are currently received by the incumbent local exchange companies. Tr. at 89. GCC referenced its offering of fixed wireless service in Reese River Valley and Antelope Valley, Nevada where it provided unlimited local usage for a flat monthly rate and stated that in Nevada the subsidies were known so GCC could provide service at that rate because it knew its costs would be covered. Tr. at 34-35. In addition, GCC would need to construct additional cell sites at an average cost of \$200,000 per site. Tr. at 109, 133. GCC stated that it would pay for any necessary antennas. Tr. at 102. GCC asserted that it would provide customer premise equipment and that all of these expenses would be factored into the cost of providing the service. Tr. at 109, 110. The units that are attached to the houses cost approximately \$300 to \$400 per unit. Tr. at 72. However, at the same hearing, GCC also stated it would provide service at a price comparable to that charged by the incumbent local exchange company. Tr. at 95.

24. The Commission finds that GCC's statements on pricing demonstrate the lack of a clear, financial plan to provision fixed wireless service throughout the state. If GCC needs to know what subsidies it may receive before pricing its service to ensure that its costs will be covered, then the Commission does not understand how it can also say that the price of that service will be comparable with that charged by the incumbent local exchange company. GCC did not show to the Commission that it had a viable financial plan to provide fixed wireless service throughout South Dakota.

25. Moreover, GCC's references to its provisioning of fixed wireless service in Reese River Valley and Antelope Valley, Nevada, only strengthens the Commission's concerns as to the viability of GCC's being able to offer a fixed wireless service throughout South

Dakota. In Reese River Valley and Antelope Valley, Nevada, customers paid \$13.50 for fixed wireless service. Exhibit 10 at 7. However, this service was highly subsidized. Nevada Bell was billed by GCC for cellular charges that exceeded the flat local rate. Id. at 13-14. GCC charged Nevada Bell 37 cents a minute during the day and 25 cents a minute at night for each minute that exceeded the flat monthly rate. Id. at 14; Tr. at 70. Nevada Bell also paid for summary billing reports which were estimated to cost approximately \$14,000. Exhibit 10 at 13; Tr. at 69. GCC was also authorized to bill Nevada Bell for non-recurring charges. Exhibit 10 at 15.

26. The Commission finds that if GCC were actually providing a universal service offering throughout the state by the use of a fixed wireless system, then the Commission would know whether there were problems with the provisioning of the service, whether GCC was offering all of the supported services, and whether it was able to offer service to customers throughout the state of South Dakota.

27. Since the Commission finds that GCC is not currently offering the necessary services to support the granting of ETC designation, the Commission need not reach the issue of whether granting ETC status to GCC in areas served by rural telephone companies is in the public interest.

ARGUMENT AND AUTHORITY

I. THE ETC DESIGNATION PROCESS IS ONE DELEGATED TO THE SDPUC AND IS GOVERNED BY EXPLICIT STATUTES.

The pertinent general statutory law for designation of an ETC is located at 47 U.S.C. § 214(e):

(e) PROVISION OF UNIVERSAL SERVICE.--

(1) ELIGIBLE TELECOMMUNICATIONS CARRIERS.--A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received--

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS.--A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the

public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS FOR UNSERVED AREAS.--If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof. (emphasis supplied)

It is to be noted the Congress has delegated to the State commission the right and attendant responsibility of designating a common carrier an ETC -- only if that common carrier meets the criteria of paragraph (1). Paragraph (1) speaks in mandatory terms in that the common carrier "shall" "throughout" the service area "offer" services supported by Federal universal support and "advertise" that such services are available. Since the language of Paragraph (1) is unambiguous, the law must be enforced by those terms. See Caminetti v. United States, 242 U.S. 470, 485 (1917). The Caminetti Court states that "[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise. . ." Id. Consequently, Western Wireless' argument that they must only demonstrate the capability to provide service clearly fails under the applicable case law. An additional hurdle of a public interest test exists if the issue of designation of an ETC involves a rural area however, in this case, this issue was not reached by the

SDPUC. Here, the record is devoid of any evidence that the applicant actually offered the requisite services.

II. THE RIGHT OF PREEMPTION BY THE FCC IS AN EXTRAORDINARY REMEDY.

The ability of the FCC to preempt the SDPUC is governed by 47 U.S.C. § 253(d) which reads as follows:

(d) **PREEMPTION.**--If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The ability of the FCC to preempt state law is grounded in the Supremacy Clause of the United States Constitution at Article VI. Case law has developed as to the criteria to be applied to effectuate preemption. Those criteria are best summed up in the case of Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355 (1986), which provides that "[p]reemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law (citation omitted), when there is outright or actual conflict between federal and state law (citation omitted), where compliance with both federal and state law is in effect physically impossible (citation omitted), where there is implicit in federal law a barrier to state regulation (citation omitted), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law (citation omitted), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress (citation omitted)." (emphasis supplied)

Western Wireless asks for preemption under either theory -- that of § 253(d) or the case law cited above. (Western Wireless petition at 9).

Preemption may not be granted under either theory because the action of the SDPUC is the exercise of a power lawfully delegated to it by Congress and its decision on the merits is consistent with federal law.

The United States Supreme Court cases cited above notably deal with a conflict between the *laws* of the Federal and State government. This authority is of dubious worth here as no *law* of the state of South Dakota is in conflict with a Federal statute. Western Wireless' reliance on this authority is therefore misplaced.

Under § 253(d), the FCC can preempt the enforcement of a statute, regulation or legal requirement that (1) is a barrier to entry or (2) if it does not, on a competitively neutral basis, preserve and advance universal service, protect the public safety and welfare, ensure continued quality service and safeguard consumers' rights.

What the FCC does in this analysis has been addressed in In the Matter of the Public Utility Commission of Texas, CCB Pol 96-13, CCB Pol 96-14, CCB Pol 96-16 (Memorandum Opinion and Order, released October 1, 1997) when it stated:

We read section 253(b), for example, to permit a state to adopt a program necessary to preserve and advance universal service if that program is competitively neutral and consistent with section 254 of the Act, at ¶ 41.

The process involves a couple of steps: (1) whether the challenged law, regulation or legal requirement violates § 253(a) standing alone; (2) if 253(a) is violated, then the focus is shifted to § 253(b) and if impermissible thereunder, preemption occurs. If it satisfied subsection (b), preemption will not occur even if it otherwise violates subsection (a), see ¶ 42.

In applying the statute and adopted test to this case, preemption should not occur. The SDPUC has not unduly prohibited Western Wireless from entry into the South Dakota

market. The SDPUC has exercised that discretion granted to it by Congress and merely determined that Western Wireless was not entitled to ETC status. It is important to note that this action does not prevent Western Wireless from providing telecommunications services. Telecommunications services are defined as:

the offering of telecommunications for a fee directly to the public, or to such classes of uses as to be effectively available directly to the public, regardless of the facilities used."

47 U.S.C § 153(46). Clearly, the SDPUC's actions only deprive Western Wireless of subsidies coexistent with the ETC status.

Secondly, under subsection (b), the SDPUC properly exercised its discretion, on a competitively neutral basis, in looking out for universal service, protecting the public, ensuring quality service and protecting consumers. It did this by holding that Western Wireless failed to comply with the requirements set forth in § 214(e). Its plans as to what type of service was to be offered were not firm (Finding 15); it failed to show that its current services are consistent with those supported by federal universal support mechanisms (Finding 12); its current infrastructure does not serve the entire state -- the area for which it sought ETC designation (Finding 20) and it had no firm plans as to how it was going to get service to the public (Findings 23, 24, 15).

III. THE SDPUC DECISION IS BASED UPON THE RECORD WHICH WESTERN WIRELESS MADE BEFORE IT.

A. WESTERN WIRELESS' CASE.

It is apparent from the findings of fact made by the SDPUC that Western Wireless came before it ill prepared to demonstrate its qualifications as an ETC. Such status cannot be granted by the SDPUC, or any other State commission, on the basis of conjecture.

Western Wireless, a *cellular* provider in South Dakota, told the SDPUC that it intended to offer universal service through a *fixed wireless offering*. (Findings 6, 7). It then tried to equate its *cellular* service to its intended *fixed wireless service* because it would use the same infrastructure. (Finding 8). However, Western Wireless' evidence contradicted this comparability. (Findings 9, 10).

Then, when the SDPUC looked at the intended fixed wireless approach, even that failed to meet ETC requirements. (Finding 12). There was no offer of free local usage, for instance. (Finding 12).

During the course of the hearing Western Wireless shifted gears in this respect. It stated it may offer universal service through PCS and LMDS but it was not the applicant before the SDPUC, namely GCC, which held these licenses. It was Western Wireless in another corporate form. (Findings 13, 14). The wrong corporate applicant was before the SDPUC if it was someone's intent to provide universal service through either of these.

It was also apparent that Western Wireless (GCC) did not even provide service in all areas of South Dakota. This was established through hearing Exhibit 9 (attached here as Appendix B) and its own admissions. (Finding 20).

Western Wireless did not have a financial or pricing plan. (Findings 23, 24).

Foremost, Western Wireless was not *offering* the services *throughout* the service territory as required by § 214(e)(1)(A). This statute speaks in mandatory terms that the common carrier seeking an ETC designation "shall" do so.

In the absence of an indication to the contrary, words in a statute are assumed to bear their "ordinary, contemporary, common meaning." (citations omitted). Walters v. Metropolitan Educational Enterprises, 117A S.Ct. 660, 664 (1997).

It is submitted that the statute, given its ordinary, contemporary and common meaning says that the common carrier *shall offer* the services *throughout* the service territory. The meaning is plain. Western Wireless did not prove its entitlement.

B. THE FIRST REPORT AND ORDER AND OTHER FCC STANDARDS.

Western Wireless at page 15 of its petition cites to a FCC decision granting ETC status, Fort Mojave, on the basis that the common carrier "offers or will be able to offer" the supported services. Designation of Fort Mojave Telecommunications, Inc., et al., as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, 12 FCC Rcd 22947, (CCB 1998). This decision is support for the decision of the SDPUC because Western Wireless neither *offered* or proved that it was *able to offer* services designated for universal service support.

Western Wireless at page 21 quotes from the Universal Service First Report and Order, 12 FCC Rcd at 8853, ¶ 137. It relies upon this language to substantiate its position that it does not have to actually offer the services supported by the universal service support mechanisms. The reliance upon this passage by Western Wireless for such support is also misplaced. It addresses the effect of § 254(e) and the situation where once a carrier is an ETC, it does not automatically get funding support but must first offer the services. This passage has nothing to do with the issue which was before the SDPUC and now the FCC of whether the carrier must offer the services throughout the service area to become an ETC. In fact a literal reading of the references to § 214(e) in the quoted passage say exactly that. To get the universal service support, the service must be *offered*.

C. THE EFFECT OF THE FIFTH CIRCUIT COURT OF APPEALS DECISION.

On July 30, 1999, in the case of Texas Office of Public Utility Counsel, et al. v. Federal Communications Commission, Case No. 97-60421, (slip opinion, 5th Circuit Court of Appeals, July 30, 1999), the issue of what State commissions may require in assessing a carrier's eligibility for ETC status. In its opinion, the Court said that the provisions of § 214(e)(2) do not prohibit a state from imposing its own eligibility requirements.

In reviewing the factual record as set forth in this response, assuming arguendo that the SDPUC completely misapplied § 214(e)(1), then it certainly has the authority under § 214(e)(2) and this Court decision to make the decision that it did.

Further, this principle applies to Western Wireless' pricing argument. Western Wireless had no demonstrable idea as to how it financially would provide a fixed wireless service throughout South Dakota, see SDPUC findings 23 and 24. This failure on Western Wireless' part bears directly on its ability to *offer* services which are supported by the federal universal service support mechanisms. If a common carrier does not know how much it is going to charge for its service, it is submitted that it cannot realistically have a sound plan for financing that service. The SDPUC could legitimately look to this criteria as a test of whether or not Western Wireless was entitled to ETC status.

CONCLUSION

Western Wireless did not prove up its case before the SDPUC. It did not show that it was entitled to become an eligible telecommunications carrier and thus receive the benefits of the universal service fund. It was ill prepared financially and otherwise, to provide service and, in fact, provided none. It came before the SDPUC with little more than a wish and a dream.

Western Wireless was not prohibited from providing telecommunications services; it was only prohibited from receiving universal service support as a result of the SDPUC decision.

There is nothing to prohibit Western Wireless from coming before the SDPUC to again seek ETC status, if and when it actually *offers* the services *throughout* the intended service area in accordance with § 214(e). Congress did not allow the SDPUC to act on conjecture, speculation or even the intentions of applicants. Congress was specific in its delegation of power to states.

Preemption by the FCC should not occur here. The state has acted properly. Western Wireless continues at the same time to appeal the SDPUC decision to State Circuit Court. Perhaps its efforts should have been and should now be directed toward actually meeting basic statutory requirements if it genuinely wants to become an ETC in South Dakota.

Dated this 27th day of August, 1999.



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CERTIFICATE OF SERVICE

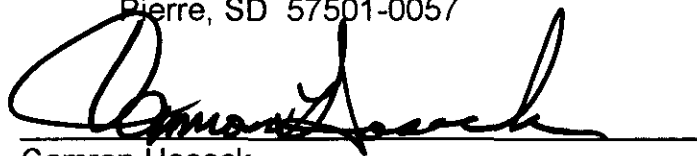
I hereby certify that copies of Comments of South Dakota Public Utilities Commission to Petition for Preemption by Western Wireless were served on the following by sending the same to them by facsimile at the address shown below on this the 27th day of August, 1999.

Mr. Gene DeJordy
Executive Director of Regulatory Affairs
Western Wireless Corporation
3650 131st Avenue S.E., Suite. 400
Bellevue, WA 98006

Mr. Alex Duarte
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U S WEST Communications, Inc.
1801 California Street, Suite 5100
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Ms. Michele C. Farquhar
Mr. David L. Sieradzki
Mr. Steven F. Morris
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Washington, D.C. 20004-1109

Mr. Richard D. Coit
Executive Director
SDITC
P. O. Box 57
Pierre, SD 57501-0057

A handwritten signature in black ink, appearing to read "Camron Hoseck", written over a horizontal line.

Camron Hoseck
Special Assistant Attorney General

APPENDIX A

APPENDIX A

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	: SS	
COUNTY OF HUGHES)	SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF)	Civ.
)	
THE FILING BY GCC LICENSE)	
CORPORATION FOR DESIGNATION)	NOTICE OF APPEAL
AS AN ELIGIBLE TELECOMMUNICA-)	
TIONS CARRIER)	

NOTICE IS HEREBY GIVEN that GCC License Corporation hereby appeals from the Findings of Fact and Conclusions of Law; Notice of Entry of Order of the Public Utilities Commission entered on May 19, 1999. This appeal is taken pursuant to SDCL 1-26-30.2 or any other statute granting such right of appeal. Notice of Entry of Order was dated and mailed on May 19, 1999.


Dated: June 3, 1999

BRIGGS AND MORGAN, P.A.
2200 First National Bank Building
St. Paul, MN 55101
(651) 223-6600

- and -

CADWELL SANFORD DEIBERT
& GARRY LLP
120 N. Phillips Avenue
P.O. Box 1157
Sioux Falls, SD 57101
(605) 336-0828

By


Steven W. Sanford

ATTORNEYS FOR GCC LICENSE
CORPORATION

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing Notice of Appeal was mailed to:

Mr. Cameron Hoseck
Executive Director
Public Utilities Commission
State of South Dakota
500 East Capitol
Pierre, SD 57501

Mr. William P. Heaston
Dakota Telecommunications Group
P.O. Box 66
29705 453rd Avenue
Irene, SD 57037-0066

Mr. Richard D. Coit
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Mr. Thomas J. Welk
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Norwest Center, Suite 600
101 N. Phillips Avenue
Sioux Falls, SD 57104

Mr. Todd Lundy
US West Communications, Inc.
1801 California Street, Suite 5100
Denver, CO 80202

by U.S. mail, postage prepaid, on June 3, 1999.



Steven W. Sanford

RECEIVED

JUL 21 1999

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

IN CIRCUIT COURT SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION
SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF)
)
THE FILING BY GCC LICENSE)
CORPORATION FOR DESIGNATION)
AS AN ELIGIBLE TELECOMMUNICA-)
TIONS CARRIER)

Civ. 99-235

**APPELLANT'S
STATEMENT
OF ISSUES**

GCC License Corporation ("GCC"), Appellant above named, hereby submits the following Statement of Issues on this appeal from the May 19, 1999 Finds of Fact, Conclusions of Law and Order of the South Dakota Public Utilities Commission ("Commission"):

1. Whether the Commission erred by unlawfully determining that 47 U.S.C. §214(e) requires an applicant for designation as an "eligible telecommunications carrier" to be actually offering or providing a universal service offering prior to obtaining designation.

2. Whether the Commission erred by finding that GCC does not currently provide the supported services set forth in 47 C.F.R. § 54.101(a) in satisfaction of the requirement for ETC designation under 47 U.S.C. § 214(e)(1).

3. Whether the Commission erred by finding that GCC cannot provide a universal service offering throughout its requested designated service area in satisfaction of the requirement for ETC designation under 47 U.S.C. § 214(e)(1).

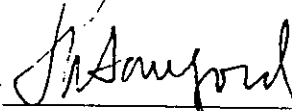
4. Whether the Commission erred by concluding that "The Commission may designate more than one ETC if the additional requesting carrier meets the requirements of section 214(e)(1)." (Conclusions of Law, ¶ 2.)

Respectfully submitted,

CADWELL, SANFORD DEIBERT
& GARRY, LLP

Date: July 19, 1999

By



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ATTORNEYS FOR GCC LICENSE CORPORATION

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing Appellant's Statement of Issues was mailed to:

Mr. Cameron Hoseck
Executive Director
Public Utilities Commission
State of South Dakota
500 East Capitol
Pierre, SD 57501


Mr. William P. Heaston
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Sioux Falls, SD 57104 :

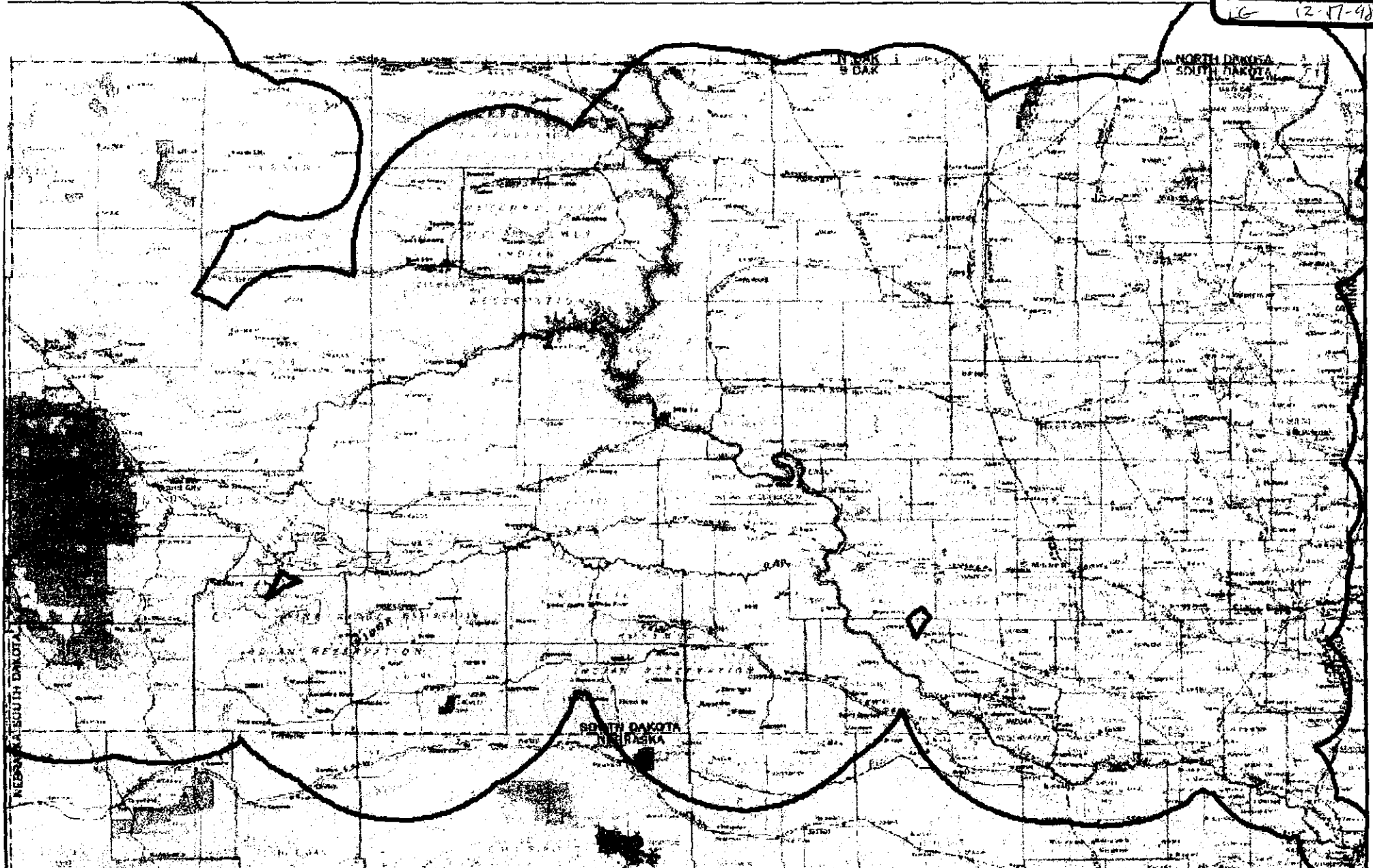
Mr. Todd Lundy
US West Communications, Inc.
1801 California Street, Suite 5100
Denver, CO 80202

by U.S. mail, postage prepaid, on July 19, 1999.



Steven W. Sanford

APPENDIX B



Western Wireless' Cellular Coverage in South Dakota